आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./**I.T.A. No.870/Chny/2020**
निर्धारण वर्ष/Assessment Year: 2011-12

The Deputy Commissioner of Income Tax, Corporate Circle 2(1), Room No. 511, 5th Floor, Wanaparthy Block, No. 121, M.G. Road, Chennai 600 034.	Vs.	M/s. JAN DE NUL Dredging (I)(P) Ltd., "Capital", 10th Floor, No. 554/555, Mount Road, Chennai 600 018. **[PAN:AAACJ6482G]**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri D. Hema Bhupal, JCIT
प्रत्यर्थी की ओर से/Respondent by	:	Shri Ashik Shah, C.A. & Ms. C. Sowndarya, C.A.
सुनवाई की तारीख/ Date of hearing	:	02.02.2023
घोषणा की तारीख /Date of Pronouncement	:	08.02.2023

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal filed by the Revenue is directed against the order of the ld. Commissioner of Income Tax (Appeals) 6, Chennai, dated 26.08.2020 relevant to the assessment year 2011-12.

2. Facts are, in brief, that the assessee is engaged in the business of dredging services and filed its return of income for the assessment year 2011-12 on 30.11.2011 admitting total income of ₹.3,86,20,850/-. The return filed by the assessee was initially processed under section 143(1)

of the Income Tax Act, 1961 ["Act" in short]. Subsequently, the case was selected for scrutiny and notice under section 143(2) of the Act was issued and also notice under section 142(1) of the Act along with questionnaire was issued on 27.05.2013 and duly served on the assessee. In response to the notices, the assessee filed all the details and after examining the same, the assessment was completed under section 143(3) r.w.s. 144C of the Act dated 31.03.2015. Thereafter, the Assessing Officer issued notice under section 148 of the Act for reopening of assessment under section 147 of the Act and the reasons recorded were supplied to the assessee on 19.03.2018. Thereafter, the Assessing Officer has completed the assessment under section 143(3) r.w.s. 147 of the Act dated 20.07.2018 and made certain additions/ disallowances.

3. The assessee carried the matter in appeal before the ld. CIT(A) and submitted that the Assessing Officer has already considered all the details and passed the assessment order under section 143(3) of the Act dated 31.03.2015. On the basis of the very same material, the assessment was reopened and additions were made, which is invalid. After considering the explanations of the assessee and by following various case law, the ld. CIT(A) allowed the grounds raised by the

assessee and held that the reopening of the assessment is invalid. Relevant portion of the ld. CIT(A)'s order is extracted as under:

> *"6.2. Ground No.2: deals with the Lack of Jurisdiction and Legality of the proceedings:*
> *I have gone through the discussion of the AO in the assessment order and the submissions of the appellant before me. During the course of appellate proceedings, the appellant submitted that the reopening did not emanate from any fresh or additional material. There was no failure on part of the appellant to disclose fully and truly all material facts during the course of scrutiny assessment, is bad in law. He further submitted that mere change of opinion cannot per se be the reason for re-opening u/s. 147, since there was no fresh evidence which merits such re-opening. It was the case of the appellant that a detailed speaking order had been passed during original assessment u/s. 143(3) after considering the return of income and all other details submitted by the appellant during the course of scrutiny assessment u/s. 143(3) of the Act. In the circumstances it pleaded for allowing the appeal. The AO, on the other hand, discussed the facts that led to the reopening of the assessment, as discussed above.*
>
> *I have gone through the AO's reasoning for the reopening of assessment and the appellant's objections to the re-opening of assessment. It is a fact that the assessment was originally completed under Section 143(3). Once the assessment had been taken up for scrutiny means that all the details/materials/ documents pertaining to the income disclosed / expenditure claimed should have been called for and examined. Once that exercise was over and the assessment had been completed, the impugned assessment cannot be reopened under section 147, unless any income chargeable to tax had escaped assessment by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued u/ s.142 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. Plethora of decisions has been rendered by various courts in this regard. The following decisions are a few:*
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> i. *Scientific Publishing Services (P) Ltd. v. DCJT in W.P.No.4808 of 2014; In this case the Hon'ble Madras High Court has held that: "I find that the AO is not justified in reopening he assessment in the absence of failure on the part of the assessee to truly and fully disclose the material fact. Therefore this Court is of the view that going by the facts and circumstances of the case, the reopening is barred by limitation as the AO has not satisfied that the assessee has failed to disclose the material facts truly and fully ... Accordingly, this writ petition is allowed and the impugned order is set aside."*

ii Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191 (SC)

iii. In Parashuram Pottery Works Co. Ltd. v ITO [19777 106 ITR 1 (SC). In this case the Hon'ble Apex Court held that ... The duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the ITO of the account books or other evidence from which material evidence could with due diligence have been discovered by the ITO will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the ITO to draw the correct inference from the primary fats. It is no responsibility of the assessee to advise the ITO with regard to the inference which he should draw from\the primary facts. It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue"...

(iv) Mere change in opinion will not entitle the AO to initiate re-assessment proceedings. Re-assessment notice cannot be issued after 4 years where there is no failure on the part of the assessee to disclose fully and truly all facts necessary for assessment. The existence of tangible material is essential to safeguard against an arbitrary exercise of this power. [Foramer France 264 ITR 566 (SC)
Kelvinator India Ltd. [2010] 320 ITR 561 (SC)
H.K. Buildcon Ltd. v. ITO 339 ITR 535 (Guj)
Aentis Pharma Ltd. v. ACIT 323 IT 570 (Bom)

Respectfully following the above decisions, I am of the considered view that inasmuch as there was no failure on the part of the appellant to disclose fully and truly all facts necessary for assessment, the invocation of section 147 is bad in law and the impugned assessment is therefore annulled. This ground of appeal is allowed."

4. Aggrieved, the Revenue is in appeal before the Tribunal. The ld. DR has submitted that the Assessing Officer, who passed the original assessment order under section 143(3) r.w.s. 144C of the Act dated

31.03.2015 has not applied his mind and therefore, there is no change of opinion. The ld. CIT(A) is not correct in invalidating the reopening of assessment order passed under section 143(3) r.w.s. 147 of the Act and therefore, the ld. DR has submitted that the same may be restored.

5. On the other hand, the ld. Counsel for the assessee has submitted that the reopening notice issued under section 148 of the Act is beyond four years from the relevant assessment year under consideration and therefore, the Assessing Officer has to satisfy the conditions laid down under the proviso to section 147 of the Act. He also pointed out that the assessee has furnished all details as called for in response to the notices under sections 143(2) and 142(1) of the Act and there is no failure on the part of the assessee to disclose all the details. Therefore, the ld. Counsel for the assessee has submitted that the notice issued by the Assessing Officer beyond four years, which is invalid and the notice issued by the Assessing Officer should be quashed.

6. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, by considering the details furnished by the assessee against the notices under sections 143(2) and 142(1) of the Act, the Assessing Officer has

completed the assessment under section 143(3) r.w.s. 144C of the Act dated 31.03.2015. However, the Assessing Officer reopened the assessment by issuing notice under section 148 of the Act. The Assessing Officer recorded the following reasons for reopening of assessment:

> *"On scrutiny of records, it is revealed that the assessee company had claimed a sum of ₹.22,26,10,622/- to M/s. Vasco Luxembourg and ₹.5,23,70,910/- to M/s. Jan De Nul Luxembourg towards lease rent for hiring vessels & equipments. However there is no TDS compliance in respect of the same. Hence the said expenses are to be disallowed u/s 40(a)(i) and brought to tax.*
>
> *Further the assessee had retention money payable of ₹.9,11,96,169/-. This liability accrues only at the time of payment. Thus the retention money (being a percentage on total contract), included in the contract charges should be disallowed and brought to tax.*
>
> *It is seen from the statements, that a sum of ₹.77,72,07,197/- is shown as unbilled Revenue. The same is to be added to the taxable income.*
>
> *On scrutiny of records, it is revealed that the assessee company had claimed a sum of ₹.30,99,69,495/- to M/s. Jan De Nul NU (Belgium) towards hire charges on using vehicles. However there is no TDS compliance in respect of the same. Hence the said expenses are to be disallowed u/s 40(a)(i) and brought to tax.*
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> *In view of the above, I have reason to believe that income chargeable to tax has escaped assessment for the asst. Year 2011-12 and he case may be re-opened u/s. 147."*

6.1 From the above reasons recorded by the Assessing Officer, it is clear that the Assessing Officer, who issued notice under section 148 of the Act has noted that the assessee has not made TDS compliance, it means, the details are already filed before the Assessing Officer and the Assessing Officer, by considering the same, the assessment order was

passed under section 143(3) r.w.s. 144C of the Act. Now, the Assessing Officer, who issued the notice under section 148 of the Act, based on the very same materials, came to a conclusion that the assessee has not complied with TDS provisions. Thus, it is amply clear that on the basis of very same materials furnished by the assessee, the Assessing Officer issued the notice under section 148 of the Act and reopened the assessment under section 147 of the Act, is clearly amounts to change of opinion, which is not permissible in the eyes of law in view of the ratio laid down in the judgement of the Hon'ble Supreme Court in the case of CIT v. Kelvinator India Limited 320 ITR 561 (SC). Thus, the assessment order passed under section 143(3) r.w.s. 147 of the Act dated 20.07.2018 is liable to be quashed.

6.2 Apart from the above, the assessment was reopened under section 147 of the Act by issuing notice under section 148 of the Act beyond four years from the relevant assessment year under consideration, the proviso to section 147 of the Act has to be complied. On plain reading of the provisions of section 147 of the Act, the Assessing Officer can reopen the assessment after four years from the end of the relevant assessment year only when both the conditions provided in section 147 of the Act are satisfied. That is:

1. The Assessing Officer must have reason to believe that income or profits or gains chargeable to tax had escaped assessment and;

2. The Assessing Officer must have reason to believe that such escapement has occurred by reason of either omission or failure on part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year or failure on part of the assessee to make a return of income under section 139 or in response to notice issued under section 142(1) or 148.

In the instant case, notice under section 148 of the Act was issued on 23.03.2018 for the assessment year 2011-12. Since action under section 147 of the Act was initiated after four years from the end of the relevant assessment year, both the conditions provided in section 147 of the Act should have been satisfied for the reopening proceedings to be held as valid. However, even assuming that the Assessing Officer had reason to believe that income had escaped assessment, the second condition was not satisfied in the instant case as the assessee had disclosed fully and truly all necessary material facts in the course of original assessment proceedings and the Assessing Officer has verified the details filed by the assessee and completed the assessment order under section 143(3) r.w.s. 144C of the Act dated 31.03.2015. Nowhere in the reasons recorded to reopen the assessment, the Assessing Officer has made a mention about failure on part of the assessee to disclose fully or truly all material facts necessary for the assessment of that year or failure on part

of the assessee to make a return of income under section 139 or in response to notice issued under section 142(1) or 148 of the Act. Since the reasons recorded in the present case did not meet the conditions stipulated under section 147 of the Act, the reassessment proceedings could not be sustained in view of the judgement of the Hon'ble Jurisdictional High Court in the case of CIT v. Schwing Stetter India P. Ltd. 378 ITR 380 (Mad).

6.3 Under the above facts and circumstances and respectfully following the judgement of Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd. (supra) and the judgement of the Hon'ble Jurisdictional High Court in the case of CIT v. Schwing Stetter India P. Ltd. (supra), we are of the considered opinion that the ld. CIT(A) has rightly quashed the reassessment order passed under section 143(3) r.w.s. 147 of the Act. Thus, the ground raised by the Revenue stands dismissed.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on 08th February, 2023 at Chennai.

Sd/-	Sd/-
(G. MANJUNATHA)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 08.02.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2.प्रत्यर्थी/ Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.